BERRY AMENDMENT TRAINING

SECTION 832,

FY 2006 NDAA

HISTORY of the Berry Amendment

Purpose

To protect the Defense Industrial Base of the United States

- Who was E.Y. Berry?

  Ellis Yarnal Berry (R) served as South Dakota's western district congressman from 1951 - 1971.

What is it?

- A statutory requirement – 10 U.S.C. 2533a
- Restricts the Department of Defense from using funds appropriated or otherwise available to DoD for procurement of:
  - "**food, clothing, tents/ tarpaulins/covers, cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, or wool (including in manufactured articles), any item of individual equipment containing any of the restricted fibers or fabrics, or hand or measuring tools,,,"**
- that are not grown, reprocessed, reused, or produced in the U.S.

What items are restricted?

- Food
- Clothing
- Tents/Tarpaulins/Covers
- Cotton and Other Natural Fiber Products
- Woven Silk or Woven Silk Blends
- Spun Silk Yarn for Cartridge Cloth
- Synthetic Fabric or Coated Synthetic Fabric
- Canvas Products
- Wool (including in manufactured articles)
- Any Item of Individual Equipment containing textiles
- Hand or Measuring Tools

DFARS 225.7002-1(a)

Anti-Deficiency Act (ADA) Violation

- Berry prohibits the purchase of certain items with "….funds appropriated or otherwise available to the Department…."
  - It only applies to funds appropriated or otherwise available to DoD, no other Federal Agencies
    - If you send funds to another Federal Agency, the Berry Amendment still applies to our funds
- It is a violation of the Berry Amendment if DoD pays for equipment that is non-compliant.
- It may also be a violation of the Anti-Deficiency Act (31 U.S.C. 1341) which provides for:
  - Fines up to $5000.00
  - Imprisonment up to 2 years (31 U.S.C. 1350)
  - Adverse personnel actions

Where is it in the Acquisition Regulations?

- Prescribed at DFARS 225.7002, “Restrictions on food, clothing, fabrics, and hand or measuring tools”
- Implemented via DFARS clauses 252.225-7012 and 252.225-7015
- Also see PGI 225.7002

General Rule

- The Berry Amendment:
  - Applies to both End products and Components
  - Requires items to be grown, reprocessed, reused, produced in the United States.

FY 2006 Legislative changes

- **Section 832 – Training of acquisition workforce for acquisition workforce substantially involved in buying textiles**
- Section 833 (a) – FedBizOps notice of certain waivers/exceptions
  - Applies only to textiles
- Section 833 (b) – “Materials and components” of clothing
  - Expands coverage of Berry to zippers, steel toes in boots, ….etc. normally part of clothing

FLOW DOWN REQUIREMENTS TO SUB-TIER SUPPLIERS

- *ARE YOU SURE* it doesn't apply to what you buy?
  - Generally, applies to both end items *AND* components.
  - Covered items may be components in less-obvious procurements (ex. fiber material in fuel filters, cotton in medical gauze/bandages). Violations may lead to:
    - Anti-Deficiency Act violations
    - GAO & IG audit
    - Congressional interest
    - Many headaches!

What's the difference between Buy American Act and Berry Amendment?

- Potential for much confusion
  - Berry Amendment only applies to DoD
    - Federal Supply Schedules may not meet requirements
      - So if you use them, you must insert the proper clause (slide #5)
  - Berry Amendment does not provide a commercial item exception
  - Berry applies *in addition to* Buy American Act
  - Berry is more restrictive than the Buy American Act
    - No "greater than 50% domestic component cost" allowance in Berry
    - No Qualifying Country exception, except for chemical warfare protective clothing and para-aramid fibers from the Netherlands, in Berry
    - No 50% proposal evaluation cost factor in Berry
    - Vendor may be in compliance with Buy American Act yet be in violation of Berry Amendment
  - No contractor "certification" required such as with Buy American Act – requirements may be overlooked

Qualifying Countries

- DoD has entered into reciprocal defense procurement memoranda of understanding with the following countries. These countries are acceptable sources for specialty metals:
- Australia France Luxembourg
- Austria Germany Netherlands
- Belgium Greece Norway
- Canada Finland Portugal
- Denmark Israel Spain
- Egypt Italy Sweden
- Switzerland Turkey United Kingdom

DFARS 225.7002-2(n)

Pre-Award

- Pre-award actions to minimize potential for violations – Avoid Non-compliance later
  - Consider the application of Berry for every procurement
    - Ask yourself – does the product I am buying contain any of the items restricted by Berry?
  - Use clauses as prescribed at 225.7002-3
  - Pre-proposal conference discussion item
  - Potential pre-award survey interest item (confirming the contractor's ability to trace origin of materials)
  - Negotiation discussion point – ensure contractor understanding of Berry Amendment requirements
  - Consider flow down requirement
  - Federal Supply Schedule orders
    - DoD ordering activity must confirm item meets Berry requirements
    - Vendor confirmation placed in delivery order file

Post award

- Post-award actions to minimize potential for violations
  - Be proactive where appropriate to avoid delayed payments and delayed warfighter support
  - Highlight compliance at post-award conferences
  - Consider ongoing DCMA assistance/emphasis IAW FAR 42.302(a)(50) to ensure contractor purchasing system/inventory practices maintain ability to implement domestic source restrictions
  - Sources Sought in FEDBIZOPS
  - Market Research, Department of Commerce
  - Alternatives?
  - Conditional Acceptance and Withhold Payment?
    - Domestic Non-Availability Determination exception

Non-compliance?

- What do I do if my contractor has a potential Berry Amendment violation?
  - Notify legal counsel!
  - Verify the item is subject to Berry restriction – ask contractor to confirm place of origin
  - Suspend Government acceptance of non-conforming items IAW FAR 46.407
  - Ensure DFAS suspends payment on non-conforming supplies pending resolution
  - Conduct market research for domestic source of item in question
    - Determine substitute item availability if no domestic source found
    - Present customer with substitute item(s) options for acceptability
  - If a Domestic Non-Availability Determination is justified, prepare for Secretarial signature prior to acceptance

TEXTILE-SPECIFIC RULES

Clothing Components

- Prior to Friday, January 6, 2006, the Berry Amendment (10 U.S.C. 2533a) provided that the Department of Defense could not buy an article or item of "clothing" that was not grown, reprocessed, reused, or produced in the United States.
- On January 6, 2006, President Bush signed into law the National Defense Authorization Act for Fiscal Year 2006. Section 833 of the Act added language to 10 U.S.C. 2533a stating that the restriction applies to clothing ''and the materials and components thereof, other than sensors, electronics*, or other items added to, and not normally associated with, clothing (and the materials and components thereof)."

*this exception for electronics only applies to clothing with electronics

Applies to An Article or Item of--

- CLOTHING AND THE MATERIAL AND COMPONENTS THEREOF;
- TENTS, TARPAULINS, OR COVERS;
- COTTON AND OTHER NATURAL FIBER PRODUCTS, WOVEN SILK BLENDS, SPUN SILK YARN FOR CARTRIDGE CLOTH, SYNTHETIC FABRIC (INCLUDING ALL TEXTILE FIBERS AND YARNS THAT ARE FOR USE IN SUCH FABRICS,
- CANVAS PRODUCTS,
- WOOL (WHETHER IN THE FORM OF FIBER OR YARN OR CONTAINED IN FABRICS, MATERIALS OR MANUFACTURED ARTICLES); OR
- ANY ITEM OF INDIVIDUAL EQUIPMENT MANUFACTURED FROM OR CONTAINING SUCH FIBERS, YARNS OR FABRICS, OR MATERIALS.

New Clothing Components Applicability

- Current contracts (funds obligated after Jan 5, 2006 are subject to the restriction, such as on 2005 IDIQ awarded contracts with continued performance)
    - Delivery Orders
    - Exercise of Options
- New contracts

EXCEPTIONS FOR TEXTILES

- **Incidental Incorporation of Textiles**

- APPLIES TO ***TEXTILES ONLY***: (NOT TO FOOD, etc.)

- Acquisitions of end products incidentally incorporating cotton, other natural fibers, or wool, for which the estimated value of the cotton, other natural fibers, or wool--

  (1) Is not more than 10 percent of the total price of the end product; and

  (2) Does not exceed the simplified acquisition threshold.

- DFARS 225.7002-2(j)

Exceptions for Textiles

- Chemical warfare protective clothing may be purchased from "qualifying countries"
  - DFARS 225.7002-2(n)
- Acquisitions of waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives
  - DFARS 225.7002-2(k)

- Acquisitions of fibers and yarns for use in synthetic fabric or coated synthetic fabric if the fabric is to be used in a component or end item that IS NOT A TEXTILE PRODUCT.
  - But this does not apply when buying the synthetic or coated synthetic fabric itself
  - DFARS 225.7002-2(o)

- Para-aramid fibers and yarns manufactured in the Netherlands. DoD has determined that procuring only domestic articles would result in sole source contracts or subcontracts for the supply of the para-aramid fibers and yarns, and the sole source contracts or subcontracts are not in the best interest of the Government, and the Netherlands permits US companies selling para-aramid firms compete with foreign firms in that country.
  - DFARS 225.7002-2(o)(2)

ADDITIONAL EXCEPTIONS TO BERRY

1. SAT Exception

- Simplified Acquisition Threshold
- Currently $100,000.00, BUT
  - Higher thresholds apply to Contingency Operations
- Must be a single, one time buy
- No splitting of requirements
- This exception cannot be used by our sub-tier suppliers—only applies for DoD buyer's prime contract.

DFARS 225.7002-2 (a)

2. Non-Availability Exception

- Acquisitions of any of the items in 225.7002-1(a), if the Secretary concerned determines that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices.
  - **Does not apply to hand or measuring tools**

DFARS 225.7002-2(b)

Non-Availability Exception

- Domestic Non-Availability Determinations (DNADS). Requests for a DNAD:
  - Should be narrowly drawn
  - Excepted item(s) should be specifically defined
    - Period of time, quantity if possible, re-analysis annually
  - Should explain market research performed, efforts made to find alternatives, and why no alternatives will suffice
  - Exceptions should require annual market research
  - Exceptions may be limited or unlimited in duration
    - It is not automatically necessary that DoD take action to maintain, create, or expand domestic industrial capabilities for the items identified in a DNAD (see DoD Handbook 5000.60-H “Assessing Defense Industrial Capabilities”)
    - In cases where DoD intends to take action to maintain, create, or expand domestic capacity, the exception should be limited to the time required to achieve adequate availability.
    - In cases where DoD action is not warranted, the exception may be unlimited in duration.
    - However, if it is anticipated that the item will be available at certain known point in the future, the exception may be limited to the intervening period.
- Requires Analysis of Alternatives – Deputy Secretary Paul Wolfowitz’ memorandum of May 1, 2001.

Non-Available Articles List

- Acquisitions of items listed in **FAR 25.104(a),** unless the items are hand or measuring tools.
  - Some items listed are available
  - Requires market research
- Removal of article from list

DFARS 225.7002-2(c)

Process for DNADS

- **See DFARS 225.7002-2(b), PGI 225.7002-2(b)(3) and your agency procedures**
- **General Content for a DNAD Request:**

1. Item or class of items, quantity, length of time DNAD is needed
2. Current and detailed market research justifying the non-availability of item(s) in satisfactory quality and sufficient quantity at U.S. market prices
3. Analysis of alternatives that would not require a domestic nonavailability determination
4. Written certification by the requiring activity, with specificity, why such alternatives are unacceptable.
5. Report and recommendation of the Contracting Activity Commander discussing supply and procurement situation (mission impacts), commercial practices, and other relevant facts in greater detail
6. Potential political ramifications, Congressional involvement, small business concerns, etc.
7. Expected outcome if a DNAD is not approved

Process for DNADS, cont'd

- **Coordinate** with Legal and organizational levels as required
- **Obtain Approval: Secretary of Army, Navy, Air Force, or USD(AT&L)**
- **Once granted, annually assess necessity of the DNAD** and determine if market conditions have changed or acceptable product substitutions have become available

- **Notification clothing/textile items:**
  - Clothing/textiles - Section 833 of the FY2006 NDAA requires notification in FEDBIZOPS within 7 days of award.

3. Combat Operations

- As determined by OSD
- “Procurements made outside the US in support of”
- Currently Limited to Middle East and Afghanistan
- Applies to all Berry restricted items/articles

DFARS 225.7002-2 (d)

4. Contingency Operations

- Consult with DOD/DLA
- In conjunction with J&A approval of other than competitive procedures on the basis of unusual and compelling urgency in accordance with FAR 6.302-2.
- Limited to Food and Hand or Measuring Tools
  - **This exception cannot be used for textiles or clothing**

DFARS 225.7002-2 (f)

5. Emergency Acquisitions or Urgent and Compelling exception

- Emergency (DFARS 225.7002-2 (g))
  - Consult with DOD knowledgeable experts in Services, DLA and DPAP as needed.
  - Overseas Activities
  - OCONUS personnel

- If “Urgent and compelling” exception in FAR 6.302-2 was used (DFARS 225.7002-2(f)
  - Only for food or hand or measuring tools, not clothing or textiles

6. Vessels in Foreign Waters

- Only applicable for buyers on vessels in foreign waters

- DFARS 225.7002-2 (h)

7. Commissary Resale

- Acquisition of items specifically for commissary resale
  - Defense Commissary Agency
  - Ship’s Stores
  - NAFIS operated by DoD

- DFARS 225.7002-2 (i)

8. Qualifying Country

- Applies only to:
  - CHEMICAL WARFARE PROTECTIVE CLOTHING
    - Acquisitions of chemical warfare protective clothing when the acquisition furthers an agreement with a qualifying country (see 225.872)
  - Para-Aramid fibers and yarns only from the Netherlands (see 225.7002-2(o))

Notification Requirements

- TEXTILES/CLOTHING:
  - Additional notification within 7 days of award
  - Required in FEDBIZOPS for DNADS for textiles and when using a qualifying country source for chemical warfare protective clothing

SUMMARY - EXCEPTIONS

- What exceptions apply?
  - Acquisitions at or below the SAT
    - Note higher SAT threshold for contingency operations and to support recovery from NBCR* attacks
  - "Domestic non-availability determinations" (DNAD)
    - Can only be approved by the Secretary of Defense or the Secretary of the military department concerned -- non-delegable!
    - Must first perform market research to confirm no domestic source is available, present requestor with alternatives that would not require a DNAD, and requesting activity must confirm that such alternatives are unacceptable
  - Procurements of items listed at FAR 25.104
    - Not an automatic exception to Berry Amendment, market research required
  - Various procurements when overseas
    - Combat operations, "emergency" acquisitions, perishable foods
  - Other miscellaneous

*Nuclear, Biological, Chemical

EXCEPTIONS FOR FOOD

1. Perishable Food

- What is Perishable?
  - Shelf Life ???
  - Needs to be Chilled, Cooled, or Frozen to Maintain Wholesomeness
- OCONUS Contract
- Personnel Overseas
- Previous Solution: BPA issued OCONUS
- New Change: “by or for” eliminates need for BPA

- DFARS 225.7002-2 (e)

2. Processed Foods

- What is processing?
- Components can be foreign/unknown
- Significant processing in U.S.
- **Exception: Seafood**

- DFARS 225.7002-2 (l)

3. Seafood Exception

- Fished within U.S. or
- Taken from sea by U.S. flag vessel
- Processed in U.S./ U.S. flag vessel

- DFARS 252.225-7002 (l) and Section 8136 of P.L. 107-248